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(4)

No. 09-1456

In the Supreme Court of the United States

JOHN J. RIGAS AND TIMOTHY J. RIGAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioners' motion to compel disclosure of notes of the government's interviews with petitioners' former corporate securities counsel.

2. Whether the district court abused its discretion in denying petitioners' motion to compel disclosure of notes of the Securities and Exchange Commission's interviews with petitioners' former corporate securities counsel and other witnesses.

3. Whether the district court erred in determining that the amount of loss attributable to petitioners for purposes of Sentencing Guidelines § 2B1.1(b) exceeded $100 million.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 583 F.3d 108. An earlier opinion of the court of appeals (Pet. App. 65a-124a) is reported at 490 F.3d 208. Opinions and orders of the district court on resentencing (Pet. App. 34a-48a), denying petitioners' motion to compel (Pet. App. 49a-52a), and denying petitioners' motion for a new trial (Pet. App. 53a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2009. A petition for rehearing was denied on December 29, 2009 (Pet. App. 125a-126a). On March 19, 2010, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including

May 28, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on one count of conspiring to commit securities fraud, to commit bank fraud, and to make and cause to be made false statements in filings with the United States Securities and Exchange Commission (SEC), in violation of 18 U.S.C. 371; 15 counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 15 U.S.C. 78ff; and two counts of bank fraud, in violation of 18 U.S.C. 1344. Petitioner John J. Rigas was sentenced to 15 years of imprisonment and petitioner Timothy J. Rigas was sentenced to 20 years of imprisonment. The court of appeals affirmed petitioners' convictions on all counts except one of the bank fraud counts, and it remanded for entry of acquittals on that count and for resentencing. The district court resentenced John Rigas to 12 years of imprisonment and resentenced Timothy Rigas to 17 years of imprisonment. The court of appeals affirmed. Pet. App. 1a-33a.

1. Adelphia Communications Corporation was one of the largest cable television providers in the United States. Petitioner John J. Rigas, who founded the company, was its President, Chairman, and Chief Executive Officer. Petitioner Timothy J. Rigas, John Rigas's son, was Adelphia's Executive Vice-President and Chief Financial Officer, and a member of its Board of Directors.

Beginning in the late 1990s, petitioners and others systematically looted the company's assets and deceived investors about material facts concerning Adelphia's

operations and finances. Petitioners' conduct included fraudulent stock purchases, sham transfers of debt, fraudulent misrepresentations of Adelphia's operating performance, defrauding Adelphia's bank lenders, and looting Adelphia's cash management system. Pet. App. 67a-81a.

On March 27, 2002, Adelphia publicly disclosed that it had approximately $2.2 billion in liabilities that it had not previously reported on its balance sheet. That day, Adelphia's stock price fell by approximately 25% to $20.39. By May 2002, the price had plummeted to $1.16 per share. In June 2002, Adelphia filed for bankruptcy, wiping out more than $4 billion in shareholder value. Pet. App. 67a-68a; Gov't 2006 C.A. Br. 6-7.

2. On July 30, 2003, a federal grand jury in the Southern District of New York returned a superseding indictment charging petitioners and others with conspiring to commit securities, wire, and bank fraud, to make and cause to be made false statements in SEC filings, and to falsify business records, in violation of 18 U.S.C. 371 (Count 1); securities fraud, in violation of 15 U.S.C. 78j(b) and 15 U.S.C. 78ff (Counts 2-16); wire fraud, in violation of 18 U.S.C. 1341 (Counts 17-21); and bank fraud, in violation of 18 U.S.C. 1344 (Counts 22 and 23). See Pet. App. 71a.

After a four-and-a-half-month trial, a jury found petitioners guilty of the substantive securities and bank fraud counts and of conspiring to commit securities and bank fraud and to make and cause to be made false statements in SEC filings. The jury acquitted petitioners of conspiring to commit wire fraud and of the substantive wire fraud charges. The jury deadlocked on whether petitioners conspired to falsify the books and

records of a public corporation. Pet. App. 65a-66a & n.1, 82a.

The district court sentenced John Rigas to 15 years of imprisonment, to be followed by six months of supervised release. The court sentenced Timothy Rigas to 20 years of imprisonment, to be followed by two years of supervised release. The court did not impose a fine or restitution order on either petitioner because the Rigas family had reached a settlement with the government under which the family agreed to forfeit more than $1 billion in assets. Pet. App. 3a-4a; Gov't 2008 C.A. Br. 3 & n.*.

3. The court of appeals affirmed petitioners' convictions on all counts except one of the bank fraud counts (Count 23). Pet. App. 65a-124a. The court reversed the convictions on that count and remanded the case for the entry of acquittals on that count and for resentencing. *Id.* at 124a. This Court denied a petition for a writ of certiorari. 552 U.S. 1242 (2008).

4. a. On remand, petitioners moved to compel the production of notes of pre-trial interviews with potential witnesses including Carl Rothenberger, Adelphia's lead outside securities lawyer. See Pet. App. 19a; *id.* at 170a-200a. The district court denied the motion. *Id.* at 49a-52a.

The district court first rejected petitioners' claim that, under *Brady* v. *Maryland*, 373 U.S. 83 (1963), they were entitled to notes of an interview that prosecutors had conducted with Rothenberger shortly before trial. Pet. App. 49a-51a. As an initial matter, the court explained that, because Rothenberger was not called as a witness at trial, the government had no statutory obligation under the Jencks Act to turn over either Rothenberger's statements or the government's notes. *Id.* at

50a; see 18 U.S.C. 3500(a) ("In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.") As for petitioners' constitutional claim of entitlement to the interview notes, the court explained that "*Brady* does not require the government to turn over exculpatory evidence 'if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence.'" Pet. App. 50a (quoting *United States* v. *Gaggi*, 811 F.2d 47, 59 (2d Cir.), cert. denied, 482 U.S. 929, and 483 U.S. 1007 (1987)). Here, finding that "[d]efendants knew of Rothenberger's existence, his role at Adelphia, and the facts on which he could testi[f]y[]," the court concluded that "the government's *Brady* obligation was satisfied." *Id.* at 51a. The court also rejected petitioners' argument that "the government's identification of only one issue on which Rothenberger possessed exculpatory information," concerning certain timber rights transactions discussed in the government's bill of particulars, see Gov't 2008 C.A. Br. 114, "nullified their information on what his testimony would be." Pet. App. 51a (internal quotation marks omitted).

The district court also rejected petitioners' claim that they were entitled to notes from interviews conducted by the SEC during its civil investigation of Adelphia. Pet. App. 52a. The court reasoned that "the United States Attorney's Office is not obligated to produce documents that are not within its 'possession, custody, or control.'" *Ibid.* (quoting Fed. R. Crim.

P. 16(a)(1)(E)). Here, the court concluded, "there was no joint investigation with the SEC, and the United States Attorney's Office cannot be obligated to produce documents in the custody of the SEC." *Ibid.*

b. The district court subsequently resentenced petitioners. Pet. App. 34a-48a. In light of the reversal of petitioners' convictions on Count 23, the district court reduced both petitioners' sentences, resulting in a term of imprisonment of 12 years for John Rigas and a term of imprisonment of 17 years for Timothy Rigas. *Id.* at 38a-40a, 46a-48a.

Petitioners argued that the district court should also reduce the sentences it had earlier imposed on other counts. Among other things, they argued that the court should revisit its imposition of a 26-level enhancement under Section 2B1.1 of the advisory Sentencing Guidelines based on a finding that petitioners' fraud caused a loss of at least $100 million. Pet. App. 41a-42a. The court rejected the argument. *Id.* at 41a-44a. The court explained that, contrary to petitioners' argument that "the Government must prove loss causation with precision," Guidelines § 2B1.1 requires only that a court make a "reasonable estimate" of the loss. *Id.* at 42a (quoting *United States* v. *Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007), cert. denied, 553 U.S. 1060 (2008)). The court noted that, when Adelphia disclosed a previously unreported $2.2 billion in liabilities, its "stock price plummeted by about twenty-five percent to $20.39; by the time the stock was delisted in May 2002, the price per share was $1.16. The company filed for bankruptcy in June 2002, wiping out all shareholder value." *Id.* at 43a (internal quotation marks and citation omitted). Relying on the government's brief, the court also noted that, "[i]n order for there to be more tha[n] $100 million

in losses to the common equityholders only, there would need only be a reduction in market price, caused by the criminal conduct for which the defendants stand convicted, of merely $0.50." *Ibid.* (internal quotation marks and citation omitted). Although petitioners had "point[ed] to other loss factors," the court concluded that "the numbers here are of such scope, the immediate press reaction to the disclosure of over two billion dollars in undisclosed debt so compelling that the claim that there was not a reasonable calculation of a loss of at least $100 million borders on the frivolous and is not made any less meritless because it is the subject of 'expert' analysis." *Id.* at 44a-45a.

5. The court of appeals affirmed. Pet. App. 1a-33a. The court rejected petitioners' challenges to the district court's decision on resentencing, including to the district court's loss calculation. The court of appeals "agree[d] with the District Court and the government that, regardless of the precise amount of the loss attributable to the Rigages' fraud, that figure easily exceeds $100 million." *Id.* at 19a.

The court of appeals also held that the district court did not abuse its discretion when it denied petitioners' motion to compel the production of interview notes. Pet. App. 30a-32a. Specifically, the court of appeals "detect[ed] no error" in the district court's conclusion that the government had no statutory or constitutional obligation to turn over its interview notes with Rothenberger, "since [petitioners] knew of Rothlenberger's role at Adelphia and the facts about which he could testify." *Id.* at 31a-32a. The court of appeals similarly upheld the district court's conclusion "that the United States Attorney's Office was not in possession of the notes from SEC interviews with Rothenberger or other witnesses, and

did not have an obligation to disclose what they did not possess." *Id.* at 32a.

ARGUMENT

1. Petitioners contend (Pet. 16-27) the government had a constitutional duty under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to turn over notes taken during the government's interview with Rothenberger, Adelphia's lead outside securities lawyer, and that the district court therefore erred in denying petitioners' motion to compel production of the interview notes. The court of appeals correctly rejected petitioners' contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

a. To establish a *Brady* claim, a defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; and (3) the evidence was material to the establishment of his guilt or innocence. *Brady*, 373 U.S. at 87. Evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles* v. *Whitley*, 514 U.S. 419, 433-434 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)).

The court of appeals in this case correctly concluded that the government had no obligation under *Brady* to turn over the notes of its interview with Rothenberger. The *Brady* rule is designed to ensure disclosure of "information which had been known to the prosecution but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976). Here, the district court found that "defendants knew of Rothenberger's role at Adelphia and the facts about which he could testify." Pet. App.

31a. The court of appeals accordingly concluded that the government had not suppressed evidence in violation of *Brady*. *Id.* at 31a, 32a.

b. Focusing on the court of appeals' citation of circuit precedent stating that "[n]o *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence," Pet. App. 31a (quoting *United States* v. *Gaggi*, 811 F.2d 47, 59 (2d Cir.), cert. denied, 482 U.S. 929, and 483 U.S. 1007 (1987)), petitioners contend (Pet. 16-20) that this Court's review is warranted to resolve a conflict in authority about whether the government's *Brady* obligations apply to facts that a defendant "should have known," that the defendant "could have ascertained through the exercise of 'reasonable diligence,'" or of which the defendant had "actual knowledge." Petitioners' contention does not warrant this Court's review.

As an initial matter, petitioners overstate the degree of disagreement among the courts of appeals. Notably, petitioners fail to identify any substantive difference between a "should have known" standard and a "reasonable diligence" standard, and courts often use the two formulations interchangeably. See, *e.g.*, *United States* v. *Skilling*, 554 F.3d 529, 575 (5th Cir. 2009) (using both formulations), aff'd in part and vacated in part on other grounds, 130 S. Ct. 2896 (2010); *United States* v. *Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991) (same).[1] And

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[1] Petitioners allow that "the 'should have known' and 'reasonable diligence' standards may operate similarly in some cases," but assert that "their difference is pronounced in cases, like this one, where the exculpatory evidence is 'contained in a witness's head,' rather than a document." Pet. 17. Petitioners fail to elaborate on the assertion, however, and the cases they cite for support do not demonstrate any sub-

although petitioners correctly note that other courts have sometimes appeared to reject both formulations, see Pet. App. 18 (citing cases); *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966), the disagreement is not as sharply drawn as petitioners suggest. The Ninth Circuit has found a *Brady* violation where police inspectors withheld the statements of a witness whom the defendants may have known to have exculpatory information (although they did not know the extent of that information or the witness's last name). *Tennison* v. *City & County of San Francisco*, 570 F.3d 1078 (2008). That court has also, however, stated that, "where the defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression." *United States* v. *Bond*, 552 F.3d 1092, 1095 (9th Cir. 2009) (internal quotation marks and citation omitted). And although the Tenth Circuit has stated that "the fact that defense counsel 'knew or should have known' about [exculpatory] information * * * is irrelevant to whether the prosecution had an obligation to dis-

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stantive difference in legal approach in cases involving information "contained in a witness's head." See *Boss* v. *Pierce*, 263 F.3d 734, 740-741 (7th Cir. 2001) (noting that "it is simply not true that a reasonably diligent defense counsel will always be able to extract all the favorable evidence a defense witness possesses," particularly when the witness is "uncooperative or reluctant"), cert. denied, 535 U.S. 1078 (2002); *United States* v. *Schledwitz*, Nos. 95-5309 and 95-5409, 1995 WL 712755, at *5 (6th Cir. Dec. 4, 1995) (per curiam) (unpublished) (holding that the defendant in that case "had to be aware" of the opinions of an individual interviewed by the FBI, where the individual "was well known to be friendly and available as a witness [and] known to have testified that there was nothing illegal about [the defendant's] role in [his] banking maneuvers," and defense counsel had interviewed him before trial) (first and third brackets in original; citation omitted), cert. denied, 519 U.S. 948 (1996).

close," it has nevertheless made clear that whether the defendant "knew or should have known" of exculpatory information "will bear on whether there has been a *Brady* violation." *Banks* v. *Reynolds*, 54 F.3d 1508, 1517 (1995).[2]

In any event, this case would be an inappropriate vehicle for resolution of the conflict in authority that petitioners allege. Petitioners do not dispute that, in all circuits, no *Brady* violation occurs if the defendant has actual knowledge of the evidence allegedly withheld by the government. In this case, the district court found that petitioners "knew of Rothenberger's existence, his role at Adelphia, and the facts on which he could testi[fy]." Pet. App. 51a. Although petitioners challenge that finding as plainly erroneous, they do not dispute that they had "'firsthand knowledge of [Rothenberger's] role' in the 'underlying events.'" Pet. 24 (quoting Gov't 2008 C.A. Br. 122). They fail to explain how they could have been aware of Rothenberger's role in the underlying events and yet unaware of the testimony that Rothenberger could have provided based on that role. See Pet. 27 (suggesting that Rothenberger could have testified about his law firm's role in "review[ing] and approv[ing] the public disclosures regarding Adelphia's co-borrowed debt" and that "petitioners were not in-

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[2] As petitioners note (Pet. 18), the South Dakota Supreme Court has recited that "where [the defendant] was not aware of the evidence, if the evidence is both favorable and material, and he has made a request for the evidence, there has been a due process violation." *State* v. *Steele*, 510 N.W.2d 661, 665 (1994) (internal quotation marks and citation omitted). That court has also made clear, however, that "*Brady* requirements presuppose that the evidence in question is unknown to the defendant *or would remain unknown to him after exercising a reasonable diligent effort to discover*." *Erickson* v. *Weber*, 748 N.W.2d 739, 745 (S.D. 2008) (emphasis added).

volved in that process"). In any event, the case-specific question whether the district court plainly erred in determining that petitioners were aware of the facts as to which Rothenberger could testify does not implicate any legal issue of recurring significance that would warrant this Court's review.[3]

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[3] Petitioners contend (Pet. 19 & n.27) that the court of appeals' reliance on their knowledge of Rothenberger's identity and role conflicts with the decisions of the Ninth Circuit and various state courts. In the cases petitioners cite, however, the defendant did not have direct knowledge of the witness's involvement in the underlying events, and thus lacked knowledge of the facts as to which the witness could testify. See *Tennison*, 570 F.3d at 1091-1092 (defendants may have heard that the witness had information about shooting, but did not know the extent of what she had seen); *Wilson* v. *State*, 874 So. 2d 1131, 1133-1134, 1143 (Ala. Crim. App. 2002) (similar), rev'd on other grounds, 874 So. 2d 1145 (Ala. 2003); *Benn* v. *Lambert*, 283 F.3d 1040, 1062 (9th Cir.) (defendants knew of experts' existence, but did not know that the experts had conclusively made determinations that undermined the prosecution's theory), cert. denied, 537 U.S. 942 (2002); *Paradis* v. *Arave*, 130 F.3d 385, 392, 395 (9th Cir. 1997) (similar). In *Chauncey* v. *State*, 127 P.3d 18 (Wyo. 2006), the court concluded that the government had suppressed notes from an interview in which the witness, who had a personal relationship with the defendant and who was living with him, stated that she had not seen him selling drugs. The court did not address whether the defendant knew that the witness could so testify. See *id.* at 20, 24-26.

Petitioners also contend (Pet. 25 n.33) that, even if they "could have had some knowledge of the topics about which Rothenberger might testify," that knowledge was "effectively nullified" by the government's disclosure only that Rothenberger "might possess information about an immaterial 'timber rights transaction.'" Petitioners fail to explain how the government's identification of the only potentially exculpatory information of which it was aware "effectively nullified" their personal knowledge of Rothenberger's role in the underlying events and the matters as to which he could testify, and the lower courts' rejection of the argument does not merit further review. See Pet. App. 51a.

Moreover, petitioners' claim of entitlement to the interview notes under *Brady* fails because they cannot identify any material information those notes might plausibly contain. Notably, they filed their motion to compel discovery after their counsel, along with others, deposed Rothenberger in 2005 and 2006 in connection with a civil case. See Pet. App. 175a; Gov't 2008 C.A. Br. 114-115. Despite having full access to Rothenberger during that deposition, petitioners did not point to any particular aspect of Rothenberger's deposition testimony as sufficiently material to the criminal proceedings to warrant a new trial. Cf. Def. Br. in Supp. of Mot. for New Trial 37-38. It is implausible that Rothenberger's statements to the government in an interview several months earlier would have had any greater relevance to petitioners' guilt or innocence than statements given in response to direct questioning by petitioners' counsel.

Finally, despite petitioners' assertion that Rothenberger's post-trial deposition testimony "suggests that the witness statements suppressed by the Government contain exculpatory information," Pet. 27, the government reviewed the notes of the Rothenberger interview and identified no exculpatory material beyond the limited disclosure about the timber rights transaction, see Gov't 2008 C.A. Br. 122. Any allegedly exculpatory information that Rothenberger may have provided in response to later questioning, see Pet. 27, has little bearing on whether, at the time of trial, the government had additional information that necessitated disclosure under *Brady*.

2. Petitioners also contend (Pet. 20-21, 26) that the court of appeals erred in concluding that the government did not have an obligation under *Brady* to disclose

notes from SEC interviews with Rothenberger or other witnesses. That contention does not warrant this Court's review.

a. Noting that "there was no joint investigation with the SEC," the district court in this case concluded that "the United States Attorney's Office cannot be obligated to produce documents in the custody of the SEC." Pet. App. 52a. The court of appeals affirmed, explaining that "the District Court found that the United States Attorney's Office was not in possession of notes from SEC interviews with Rothenberger or other witnesses, and did not have an obligation to disclose what they did not possess." *Id.* at 32a.

b. Petitioners argue (Pet. 20, 26) that the court of appeals' focus on what the prosecutors possessed is inconsistent with this Court's instruction that the government has "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437. Petitioners are correct that the government has such an obligation, and the Second Circuit has so recognized. See *United States* v. *Gil*, 297 F.3d 93, 106-107 (2002) ("The government is reasonably expected to have possession of evidence in the hands of investigators, who are part of the 'prosecution team.'") (citing *Kyles*, 514 U.S. at 438-439). The decision below, which held that the government had no obligation to disclose the SEC's notes, given the relationship between the two agencies, is consistent with that principle.

c. Petitioners further argue (Pet. 20-21) that this Court's review is warranted to resolve a conflict of authority about when the prosecution is obligated to disclose exculpatory evidence in the sole possession of another agency. In particular, petitioners contend that the

Second Circuit's "focus on whether the agency or official in possession of the evidence was part of the 'prosecution team,'" Pet. 21, although consistent with the approaches of the Third and Eleventh Circuits, conflicts with the decisions of other courts of appeals that have stated that, "if a government agency is charged with the administration of a statute and has consulted with the prosecution in the case, the agency will be considered part of the prosecution, and its knowledge of *Brady* material will be imputed to the prosecution," *United States* v. *Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999)), cert. denied, 528 U.S. 1161 (2000); see *United States* v. *Wood*, 57 F.3d 733, 737 (9th Cir. 1995).[4] There is, however, no direct conflict. In both *Bhutani* and *Wood*, the court held that the Food and Drug Administration (FDA) was obligated to disclose information bearing on the safety and effectiveness of drugs the defendants had been charged with unlawfully manufacturing or dispensing. See *Bhutani*, 175 F.3d at 577; *Wood*, 57 F.3d at 735. The courts' decisions in those cases are not inconsistent with an approach that focuses on whether a governmental agency is part of the prosecution team. See *United States* v. *Pelullo*, 399 F.3d 197, 218 n.22 (3d Cir. 2005) (explaining that the courts in *Bhutani* and *Wood* both "found the FDA part of the prosecution team" based on

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[4] Petitioners (Pet. 20) also cite *United States* v. *Brooks*, 966 F.2d 1500 (D.C. Cir. 1992), as having articulated the same standard. In concluding that the U.S. Attorney's Office in the District of Columbia had a duty to search the files of the Metropolitan Police Department for exculpatory information, however, the court in *Brooks* cited "the close working relationship between the Washington metropolitan police and the U.S. Attorney for the District of Columbia (who prosecutes both federal and District crimes, in both the federal and Superior courts), a relationship obviously at work in this prosecution." *Id.* at 1503.

their involvement in the prosecutions), cert. denied, 546 U.S. 1137 (2006).

Petitioners err in contending (Pet. 20-21) that the decision below conflicts with *United States* v. *Reyes*, 577 F.3d 1069 (9th Cir. 2009), in which the court held that the prosecution was "charged with knowledge of [a] parallel SEC investigation." *Id.* at 1078. The court in *Reyes* emphasized that in that case, "the FBI, SEC, and U.S. Attorney's Office forged a strong, cooperative relationship in pursuing civil and criminal punishment" for the misconduct at issue in that case. *Ibid.* The court did not, as petitioners appear to suggest (Pet. 20-21) hold that the prosecution in securities fraud cases is always charged with knowledge of parallel SEC investigations, regardless of the working relationship between the two agencies.

In any event, as the government explained below, the government inquired of the SEC whether it possessed exculpatory information concerning Rothenberger and other witnesses, and is satisfied that the SEC does not possess such material. Gov't 2008 C.A. Br. 132. For that reason as well, further review is not warranted.

3. Finally, petitioners contend (Pet. 28-35) that the lower courts erred in computing the amount of loss attributable to their fraud for purposes of Section 2B1.1(b)(1) of the advisory Sentencing Guidelines. Petitioners' argument lacks merit and does not warrant this Court's review.

a. As the court of appeals noted, "[i]n calculating the amount of loss under the Guidelines, a sentencing court 'need only make a reasonable estimate of the loss'" caused by the defendant's fraud. Pet. App. 19a (quoting Guidelines § 2B1.1, comment. (n.3(C)). Here, the court noted, "on the day Adelphia's $2.2 billion in previously

unrecorded liabilities were disclosed, the company's stock price dropped 'about twenty-five percent to $20.39,' and * * * Adelphia filed for bankruptcy within months." *Id.* at 20a. The court noted that, "even if a loss of only $0.50 per share were attributable to [petitioners'] fraudulent conduct, that would still satisfy the $100 million threshold for the sentencing adjustment applied to the count." *Ibid.* The court accordingly "ha[d] no trouble affirming the District Court's estimate of loss caused by [petitioners'] fraud." *Ibid.*[5]

b. Petitioners contend (Pet. 31-33) that, regardless of the amount of loss to Adelphia's shareholders, "it is impossible to establish a causal link between petitioners' conduct" and those losses, Pet. 31, and that the courts below failed to consider expert testimony pointing to other loss factors. Petitioners' contention lacks merit. The courts below traced the loss to the disclosure of Adelphia's $2.2 billion in liabilities, which revealed that petitioners had, among other things, concealed from securities analysts and investors Adelphia's massive and growing debt and led the public to believe that securities purchases by the Rigas family had been paid for in cash. See Pet. App. 20a, *id.* at 43a-44a; Gov't 2008 C.A. Br. 56-67. The courts below reasonably concluded that, notwithstanding petitioners' efforts to point to other causal factors, the evidence presented at trial was sufficient to demonstrate by the preponderance of the evidence that petitioners' fraudulent conduct caused a loss greater

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[5] The court of appeals also noted that petitioners took more than $200 million from Adelphia's Cash Management System, Pet. App. 19a, a matter not explicitly raised in the district court's discussion of loss causation, see *id.* at 43a-45a. The court of appeals did not, however, rest its affirmance of the district court's loss determination solely on that ground. See *id.* at 19a-20a; cf. Pet. 33.

than $100 million. See Pet. App. 18a-20a, *id.* at 41-44a. In so concluding, the courts below considered petitioners' expert testimony pointing to other loss causation factors, but considered the testimony insufficient to undermine the conclusion that petitioners' fraud caused a loss of at least $100 million. See *id.* at 44a-45a ("[Petitioners] point to other loss factors * * * but the numbers here are of such scope * * * that the claim that there was not a reasonable calculation of a loss of at least $100 million borders on the frivolous, and is not made any less meritless because it is the subject of 'expert' analysis."). Those factbound determinations do not merit this Court's review.

c. Petitioners contend (Pet. 28-34) that this Court's review is warranted to resolve a conflict of authority about whether the loss-causation principles described in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), apply to criminal sentencing. This Court's review is not warranted.

In *Dura*, a civil securities fraud case, the Court held that plaintiffs suing defendants who manipulated the price of a stock could not satisfy the "loss causation" requirement of federal civil securities law by establishing that the stock's price was inflated because of the defendants' manipulations on the date that the plaintiffs purchased the stock. 544 U.S. at 340. The Court reasoned that, "as a matter of pure logic," the plaintiff has suffered no loss at the time of purchase because, at that moment, the price paid and the share bought possess equivalent value. *Id.* at 342. The Court observed that, at most, the higher purchase price might sometimes bring about a future loss, but that is "far from inevitably so." *Ibid.* The purchaser could sell the shares before the manipulation is discovered and suffer no loss at all.

Moreover, even if the later sale results in a loss, that loss could be due to factors other than manipulation. *Id.* at 342-343.

The Court in *Dura* had no occasion to construe Sentencing Guidelines § 2B1.1(b)(1). The court of appeals' application of Section 2B1.1(b) thus does not directly implicate this Court's decision in that case. Petitioners contend (Pet. 28-30), however, that the decision below conflicts with *United States* v. *Rutkoske*, 506 F.3d 170 (2d Cir. 2007), cert. denied, 553 U.S. 1060 (2008), and *United States* v. *Olis*, 429 F.3d 540 (5th Cir. 2005), which looked to the loss-causation principles articulated in *Dura* as the "the backdrop for criminal responsibility" and as "[u]seful guidance" for determining loss causation in the criminal context. *Olis*, 429 F.3d at 546; see *Rutkoske*, 506 F.3d at 179.

In both *Rutkoske* and *Olis*, the courts remanded for reconsideration of loss causation where the courts had failed to ensure that the loss resulted from the defendants' offense. See *Rutkoske*, 506 F.3d at 178-180 (noting that the district court had attributed the entire amount of the decline in stock value, through a date that "had no particular relevance to the offense conduct, and in fact was three months after the end of the charged conspiracy," to the defendant's offense conduct, without considering other factors that might have contributed to the decline); *Olis*, 429 F.3d at 548 (noting that "two-thirds of the drop in [stock] price occurred either before the revelation of [the fraudulent conduct] or more than a week after the announcement of the restatement of earnings caused by [the fraudulent conduct]," and thus, "a substantial portion of the entire loss * * * could not have been caused by [the fraudulent conduct]").

The court of appeals in this case, like the courts in *Rutkoske* and *Olis*, recognized that "'[t]he loss must be the result of the fraud,' as opposed to other, non-fraudulent occurrences." Pet. App. 19a (brackets in original; citation omitted). The court held, however, that, given the facts of this case, "regardless of the precise amount of the loss attributable to [petitioners'] fraud, that figure easily exceeds $100 million." *Ibid.* The court's case-specific determination does not warrant further review.[6]

In any event, this Court does not ordinarily review decisions interpreting the Sentencing Guidelines because the Sentencing Commission can amend the Guidelines to eliminate a conflict or correct an error. *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991); see *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue * * * to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). That practice is especially appropriate now that the Guidelines are advisory. See *id.* at 245.

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[6] Review would not be warranted in any event to address a purported intracircuit conflict with *Rutkoske*. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[*] The Acting Solicitor General is recused from this case.